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NO. 06-1361

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

MARCEL SFARCIOC

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the refusal to hear Petitioner's Appeal, due to a late filing caused by a four day delay in delivery of Overnight Express Mail by the U. S. Postal Service, violates the Due Process Clause of the U.S. Const. amend. V.

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REPLY ARGUMENT

Petitioner (Pet. pg. 9-12) argued that various circuit courts, including the Sixth Circuit, have considered an unexpected delay of Overnight Delivery mail by the United States Postal Service (USPS) to constitute an "extraordinary or unique interference" and have excused untimely filing of "Appeal" to the Board of Immigration Appeals (BIA). These Courts have ordered the lower courts, such as BIA, to hear the case despite this late filing. See citation in Petitioner's Brief, *Anssari-Gharachedaghy v. INS,* 210 F.3d 512 (6th Cir. 2000); *Zhong Guang Sun v. US Dept of Justice*, 421 F.3d 105 (2nd Cir. 2005); *Oh v. Gonzalez*, 406 F.3d 611 (9th Cir. 2005).

Respondent concedes (Resp. Brief, pg. 5, ¶2) to such rulings by the Second, Sixth, and Ninth Circuits. However, Respondent argues that such rule does not apply to delay of Overnight Delivery by USPS to excuse a late arrival of PETITION FOR REVIEW at the Court of Appeals. Such distinction of the rule is without basis and is a double standard followed by the Court of Appeals. Therefore, it is proper for this Honorable Court to grant Certiorari for review.

Respondent further states that Petitioner has not cited any Court of A[illegible]cedent in which a late delivered Petition

for Review has been accepted. It is our assertion that if such a request would have been granted by the Court of Appeals, it is highly unlikely that the decision would be published or brought to the Supreme Court by the government. Therefore, this is an issue properly before this Honorable Court.

Interestingly, the Supreme Court follows S. Ct. Rule 29.2 to determine when a Petition is considered "timely" filed. The Rule states "A document is properly filed if it is . . . **sent** [mailed] to the Clerk through the Unites States Postal Services by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mail **on or before the last day for filing.**" Under the Supreme Court Rule, the Petitioner's Petition for Review would have been timely filed when possession of the package was accepted by the U.S. Postal Service on August 23, 2006 (2 days prior to the deadline). Thus, there is a three-way inconsistency between the BIA rule (as directed by the Court of Appeals), the Court of Appeals rule, and the rule followed by this Honorable Court. Such contradiction requires clarification and therefore the issue is properly before this Honorable Court.

Respondent further argues that this case is moot because the BIA re-issued its decision (on July 26, 2007) and that gave

petitioner a new opportunity to re-file his case with the Court of Appeals. Petitioner asserts that this is simply not true. Respondent, by having the BIA re-issue its decision attempted to achieve mootness, in order to avoid the litigating the only issue that is properly before this Court. This is exactly why there is an exception to the mootness doctrine for issues "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). It was not a condition that Petitioner agreed to re-file his petition upon the re-issuance of the BIA decision. That action would only aid in the government's attempt to moot the issue and evade review. Petitioner should not be required to re-file his appeal.

Further, this Honorable Court should note that under 8 CFR 1003.6, it is **required** that the Order of Removal (or Deportation) is stayed until BIA has made its final decision:

> § 1003.6 Stay of execution of decision.
>
> (a) Except as provided under §236.1 of this chapter, §1003.19(i), and paragraph (b) of this section, the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification

Accordingly, BIA re-issued its final decision on July 26, 2007 while the Petitioner was deported out of the United States in October 2006. Respondent did not attempt to bring the Petitioner back to this country. This creates a violation by the Respondent of its own regulation. The Court should cite the Respondent for its failure to follow the law.

Respondent, in this case, has acted wrongfully and now that this litigation has been commenced, attempts a ploy in order to avoid the litigation. Obviously, a party could stop acting improperly just long enough for the case to be dismissed and then resume the improper conduct. For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000). A polluter had ceased polluting as an attempt to moot the issue. The Court noted, "It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite*, 455 U.S., at 289, 102 S.Ct. 1070. "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.' " *Id.*, at 289, n. 10, 102 S.Ct. 1070 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953))."

Such is the case here. When will the sole issue in this case ever be decided? That issue is whether "Petitioner's

appeal should be reinstated because the late submission was caused solely by the U.S. Postal Service, and this should be considered "extraordinary or unique interference." Respondent states that no previous cases could be found addressing this issue. There can be no cases where a Court of Appeals decides an issue when it is **the** party causing the complaint. Only this Honorable Court can decide if a Court of Appeals has erred. Clearly the issue has not arisen because it has **evaded review.** It is ripe for a decision.

Respondent further argues that the Petitioner would lose anyway on the merits. This is, by no means, certain. In a similar case, *Bobic v. Gonzalez*, No. 07-3148 (6th Cir. June 1, 2007, Pending), the government filed a motion to dismiss for lack of jurisdiction for a Petition for Review, just as they argue in their response here. (Resp. Brief, pg 6, ¶3 citing 8 USC 1252(a)(2)(B)(i)). The Sixth Circuit denied that motion. Thus the government is without any meritorious argument and this Honorable Court should grant the Certiorari for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 21, 2007

I certify that a true and correct copy of this brief was served on the counsel of record below at the address or record on September 20, 2007.

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